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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No Docket Assigned on Appeal

Civil Action No. 7973(1) in The United States District Court for the Eastern District of Missouri, Eastern Division.

McGRAW ELECTRIC COMPANY, A CORPORATION,
Appellant

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE AKRON, CANTON AND YOUNGSTOWN RAILROAD COMPANY, ET AL.

MOTION OF AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL. TO AFFIRM—Filed May 28, 1954

Appellees, Intervening Defendant Railroads, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the order of the District Court be affirmed.

This is a direct appeal from the final decree entered April 2, 1954, by a District Court of three judges specially constituted pursuant to 28 U. S. C. sec. 2284, dismissing appellants' complaint which sought to set aside an order made

by the Interstate Commerce Commission. Appeal was allowed May 12, 1954, and appeal papers were served May 13, 1954.

Appellants' Statement as to jursidiction indicates that this proceeding involves two primary issues: (1) Were complainants deprived of a full and fair hearing before the Interstate Commerce Commission, and (2) Are the Commission's findings supported by substantial evidence?

These questions were given full consideration by the District Court, which decided against appellants. In making its determinations the District Court was clearly right.

It is submitted that the appeal presents no substantial questions, and that the order of the District Court should be affirmed without argument.

I. No Substantial Question Concerning the Right to Full Hearing Is Here Presented

Appellants' contention that a full and fair hearing was not accorded rests solely upon the fact that two of the three Commissioners who decided the case had not heard the oral argument. On the other hand, arrayed against this alleged irregularity we have the following procedural facts which are conceded by appellants.

(a) All of the Commissioners who decided the case read the transcript of oral argument.

(b) All of the Commissioners who decided the case read and considered the various evidence and testimony which had been presented in written form under the shortened procedure pursuant to Rule 44 of the Commission's General Rules of Practice.

(c) All of the Commissioners who decided the case had read and considered the briefs and exceptions to the Examiner's report filed by both appellants and appellees.

(d) Oral argument in such proceeding is not a right provided by statute.

(e) Oral argument in such proceeding is provided for in Rule 98 of the Commission's Rules of Practice, not as a right which the parties may assert, but as a privilege which the Commission may grant in its discretion.

(f) At the time oral argument was heard, a quorum of the Division which decided the case was present.

(g) The full Commission considered both appellants' petition for reopening and reconsideration, as well as its supplemental petition for reopening and reconsideration, and that thereafter it denied both petitions.

There is no dispute concerning the procedural facts which have been outlined above. In the light thereof it is submitted that the alleged irregularity was harmless and did not result in the denial of a full and fair hearing within the meaning of the due process clause of the Constitution or of the applicable provisions of the Interstate Commerce Act.

It is submitted that appellants contention in this respect, although not frivolous, is nevertheless lacking in any essential merit. That the issue is not a substantial one is demonstrated by the following.

A. *The cases relied upon by appellant are clearly inapposite*

On pages 16 and 17 of appellants' Statement as to Jurisdiction the case of *Morgan* v. *United States*, 298 U. S. 468 is quoted, at pages 480-481, as follows:

> "The one who decides must hear" [the oral argument]

The material appearing within the square parenthesis is appellants' interpolation. Thereby appellants seek to make the *Morgan* case stand for the proposition that the one de-

ciding the administrative proceeding must hear the oral argument.

Appellees herein assert that the *Morgan* case clearly does not establish such proposition. Appellants assertion to the contrary is based upon a kind of play on words. This is accomplished by attempting to attach to the word "hearing" purely aural connotations. As a result, in appellants terms the verb "to hear" is no broader in meaning and implication than the verb "to listen". Appellants thus modulate to the position that "to hear argument" means "to hear oral argument."

That this is a wholly specious proposition can be seen by only a cursory examination of the *Morgan* case. For there the question presented was whether a full hearing was accorded where the administrative officer promulgating a rate order did so without having heard either the oral arguments or having read the written arguments (briefs), and without having heard or read any of the evidence.

Obviously, there was a situation which, with regard to the improprieties involved, far surpasses the instant one. That case does make clear, however, that the concept of "hearing" is not exclusively an aural one. Rather it is a concept embodying the entire process of presentation of evidence and argument, both oral and written, as well as the consideration of that evidence and argument by the hearing officer. Thus this Court said at pages 480-481

> The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is clear that the hearing has not been given.

It is thus clear that when this Court said that "The one who decides must hear", it was not saying that the one who decides must listen to oral argument. Rather this Court

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meant that the one who decides must consider the evidence and argument which has been presented.

It is thus clear that the *Morgan* case does not stand for the proposition which appellants here assert, namely, that oral argument must be considered aurally by the hearing officer.

The appellants also cite the so-called second *Morgan* case. *Morgan* v. *United States*, 304 U. S. 1, 18. A reading of this case, however, reveals that it was solely concerned with whether a fair hearing required that each adverse party be apprised of the charges and contentions of the other. The case had nothing to do with oral argument.

Next appellants refer, as a "pertinent analogy", to *Ayrshire Collieries Corp* v. *United States*, 331 U. S. 132. In this case only two of the three judges in a three-judge district court participated in the determination of the cause. This Court held that participation of all three judges was necessary.

These facts alone demonstrate the lack of analogy between that case and the instant one. For here there was full participation by all members of the Division in the case except for the fact that two Commissioners read the transcript of oral argument rather than listened to the oral argument. In the *Ayrshire* case, however, the third judge had not participated in any part of the proceeding.

Moreover, in the *Ayrshire* case no provision was made in the statute that a quorum of less than three judges might determine the case. The absence of such provision strongly suggested the necessity of participation by all three judges in the decision. The question whether oral argument, aurally considered by all members of the court, was necessary to a full hearing was not discussed.

These cases then do not afford the slightest support for the contention here advanced by appellants.

In addition, however, appellants refer to a statement continued in the dissenting opinion in *Eastland Co.* v. *Federal Communications Commission*, 92 F. (2d) 467, 472. This statement reads as follows (page 472):

> "And I think Congress meant that when the Commission, proceeding by examiner, and therefore merely reading the evidence, heard oral argument, at least a majority of the Commission that heard the oral argument must decide the case. To make oral argument to those who are not to decide would be vain * * *."

This statement is not relevant to the issues here involved. In the first place the Commission did not proceed by examiner in the *Eastland* case. Consequently, the dissenting judge's remark is purely an aside. Moreover, in making this statement the dissenting judge relied upon a specific statutory provision providing that "In all cases heard by our examiner the Commission shall hear oral arguments on the request of either party."

In other words at the time of this case oral argument was made mandatory by statute in proceedings, before the Federal Communications Commission. With respect to the case here on appeal, however, oral argument is provided for only by Commission rule. Moreover, under such rule litigants do not have the unqualified right to argument; the rule instead confers a privilege, the granting of which is dependent upon the discretion of the Commission.

Consequently, the statements of associate justice Stephens, regardless of their cogency as regards the case with which he was concerned, have no relevance whatsoever to the case here on appeal. It is clear therefore that the cases relied upon by appellants are not opposite to the issues here presented.

B. *The issue here presented has been decided adversely to appellants' contentions*

It is the position of these appellees that the issue here presented has been decided by the case of *Eastland Co.* v. *Federal Communications Commission*, 92 F(2d) 467, certiorari denied 302 U. S. 735.

In this case it was contended that an order and decision of a division of the Federal Communications Commission was invalid because two of the three Commissioners deciding the case had not heard the oral evidence, although they had seen and considered stenographic reports of that testimony as well as copies of the written evidence. The court held that under these circumstances the decision was not invalidated. As an additional ground for denying the appeal the court referred to the fact that appellant had failed to raise the point on petition for reconsideration.

It follows from this case that if the fact that a majority of an administrative tribunal need not hear the oral testimony, of even less importance is the fact that a majority did not hear the oral argument. For in the case of testimony it can be said to be important for the hearing officers to actually hear and see the witnesses in order to to properly assess their credibility—which often depends upon subtle aspects of demeanor and manner of testifying. See *United States ex rel. Chin Cheung Nai* v. *Corsi*, 55 F. (2d) 360, 361.

But although demeanor and manner of speech may be important in the case of a witness giving testimony, they can hardly be said to be important in the case of counsel presenting oral argument. With all deference it is submitted that failure of the administrative officers to observe counsel's gesticulations or to hear his eloquence in his own cause, hardly presents a question of due process.

If the *Eastland* case is correct, *a fortiori*, the instant case is correct. Certiorari was denied in the *Eastland* case.

C. *The failure to hear oral argument is unimportant in the light of the full hearing otherwise accorded*

It has been demonstrated above that appellants have failed to cite any case sufficiently apposite to even suggest that, under the facts here involved, a full and fair hearing was denied. On the other hand the case of *Eastland Co* v. *Federal Communications*, 92 F(2d) 467, is clearly apposite. If that case is correct, then, *a fortiori* appellants' position here is without merit.

Quite apart from precedent, however, it should be apparent that no substantial question concerning the denial of full hearing is here involved. For, as above demonstrated, the hearing accorded appellants was, with the exception complained of, as full and complete as was possible under the current rules of Commission practice. That is, all of the members of the Division deciding the case read and considered not only the written evidence and testimony, but, in addition, considered three separate arguments presented by complainant. These arguments were

(a) The argument included as part of appellants' original statement under the shortened procedure

(b) The argument included in appellants' exceptions to the examiner's proposed report.

(c) The written transcript of oral argument.

In addition, the full commission gave consideration to the arguments of appellants as presented in two separate petitions for reconsideration.

In view, therefore, of the fact that all of the evidence and testimony was presented and considered in a manner not complained of, and in view of the fact that extensive arguments were presented and considered in written form, the matter here complained of becomes slight and unimportant in the perspective of the whole proceeding. So con-

sidered, it is at most an irregularity that cannot be said to have had any substantial effect upon appellants' rights. It cannot, therefore, be seriously contended that the deficiency complained of violates current concepts of due process.

The question presented to the court, therefore, is not substantial.

II. Whether the Findings of the Commission Are Supported by the Evidence Does Not Present a Substantial Question

Appellants here seem to argue that the District Court erred in not finding that the Commission wrongly decided the questions presented under sections 1, 2, and 6 of the Interstate Commerce Act. In addition, appellants contend that the District Court erred in failing to consider *de novo* the issue, under section 6 of the Act, of the applicable tariff designation to be applied to the commodity involved.

Appellees submit that no substantial question is here presented.

A. *The District Court did not err in failing to consider de novo the question of the applicable tariff rating*

Appellants' argument here is that the tariff terms involved are not used in a technical sense and that therefore the proper tariff description is a matter of law which the District Court should have determined. Appellants in support of their position cite *Brown & Sons* v. *Louisville & N. R. Co.*, 299 U. S. 393, 398-399; *Standard Oil Co.* v. *United States*, 383 U. S. 235, 238, 239.

Appellants' position is not well taken. The issue involved in the last cited cases was whether the Commission had primary jurisdiction; that is, whether the case involved matters so technical in nature that a preliminary determina-

tion must be made by the Commission. The rule referred to in these cases is that if the issue involves an enquiry which is like that commonly made by courts when called on to construe and apply any other document, the matter may be raised in an action at law without primary resort to the Commission. On the other hand where there is involved consideration of matters requiring expert knowledge for the ascertainment of the technical meanings of words, preliminary resort must be had to the Commission. This is the doctrine of primary jurisdiction.

On the other hand, if preliminary resort has been had to the Commission, *regardless of whether such preliminary resort was necessary*, the District Court may not consider, *de novo*, any matter decided by the Commission, irrespective of whether it involves the application of expert knowledge to the meaning of words. *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 277; *Tagg Brothers & Moorehead* v. *United States*, 280 U. S. 420, 443-5.

In other words, proceedings under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission are proceedings for judicial review and involve, apart from errors of law, only the question of whether the administrative findings and conclusions are supported by substantial evidence, regardless of whether the courts would themselves reach the same conclusions. *I. C. C.* v. *Union Pacific R. Co.*, 222 U. S. 547-548.

The function of the reviewing court is well stated in *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, wherein the court said (at page 287)

> The judicial function is exhausted when there is found to be a rational basis for the conclusions of the administrative body.

It is only necessary that the findings of the Commission be supported by substantial evidence. *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501.

B. *The issue of applicability here involved is not solely a question of law*

It is true, of course, that the District Court, in exercising its reviewing function, might properly consider whether the Commission committed any error of law. Appellants contend that the issue of applicability of the assessed rating involves only a construction of the tariffs. It is said that such construction is no different than the construction of a contract and has always been considered to be a legal question.

Appellants are in error. For this issue herein does not involve merely an interpretation of a tariff. It, in addition, involves certain determinations of fact, namely, the meaning of the tariff term "fuses" in ordinary industrial and commercial usage, as well as a determination of what is comprehended in the designation "parts" of various electrical machinery. The issue thus involves questions of law and fact "inextricably intermingled."

The issue is similar to that in *Old Colony Furniture Co.* v. *United States*, 95 F. Supp. 507 (D. C. Mass., 1951) one of the few cases involving the appeal of an order denying reparation. This case involved the question (as does the instant case) of which of two tariff items was applicable to the shipments in question. Briefly, the question resolved itself into whether the paint on the objects shipped was a "preservative" or a "protective coating."

With respect to scope of review to be accorded this question the court said (at page 510):

> (5) It is true that it has been frequently said that the construction of a railroad freight tariff, like that

> of any other document, is a question of law. But at times, as is the case here, the question of law is inextricably mingled with questions of fact. Here as petitioners themselves contend, the words of the tariff must be given the sense which they would convey to the shipper who reads it. But this in turn requires findings of fact as to the meanings which these words have in industrial usage. Cf. *Great Northern Railway Co.* v. *Merchants Elevator Co.*, supra. These latter findings of the Commission, being supported by substantial evidence, cannot be upset. In the light of these findings, the Commission's ruling as to which item of the tariff is applicable is correct. (emphasis supplied)

Here also the function of this Court is to determine whether the Commission's findings are supported by substantial evidence. In the instant case the fact issue is the meaning of the term "fuses". Are they "parts" of electrical appliances? The Commission held in the negative. It did so on the basis of substantial evidence as to the meaning of this term in the electrical industry. As indicated in the *Old Colony* case, supra, its finding therefore cannot be upset.

The distinction made by the Court in the *Old Colony* case is fundamental in the law. No better statement of the distinction can be found than that given by Justice Brandeis in *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 292, 66 L. Ed. 943, 947:

> "When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. The extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed. Or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches provisions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words,

> or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed if the jury finds that the alleged peculiar meaning or usage is established. But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language,—a question of law,—but upon whether or not a particular judge or jury had found, as a fact that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed. (emphasis supplied)

See also *Texas & Pacific Ry. Co.* v. *American Tie & Timber Co.* 234 U. S. 138, 58 L. Ed. 1255, wherein the Court held that the question of whether oak cross-ties were "lumber" within the meaning of the tariff item naming rates on the latter commodity involved the primary jurisdiction of the Commission. The necessity for such primary resort to the Commission was emphasized by the "conflict and confusion in the testimony concerning whether cross-ties were included in the filed lumber tariff." See also *Standard Oil* v. *United States*, 283 U. S. 235, 75 L. Ed. 999.

The issue in the instant case under the section 6 allegation involves a determination of the meaning of the terms "fuse" and "parts" of electrical appliances.

Since these issues are factual and since the evidence concerning them is conflicting, review must be limited to a consideration of whether the Commission's finding on the law-fact issue is supported by substantial evidence.

C. *The Commission's findings under sections 1, 2, and 6 of the Interstate Commerce Act are supported by substantial evidence*

It has been shown above that the review of the findings of the Commission under section 6 of the Act is limited, as is review of the findings under sections 1 and 2, to the question of whether there is a rational basis for those findings—irrespective of whether the Court, if it were exercising the functions of the Commission, would have reached the same result. Such question is basically one of whether the Commission's findings are supported by substantial evidence. *Rochester Telephone Corp.* v. *United States*, 307 U. S. 235 146, 83 L. Ed. 1147, 1161; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287, 78 L. Ed. 1260, 1264, 1265; *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 303, 81 L. Ed. 659, 664.

Appellees do not believe that any useful purpose would be achieved by burdening this motion with detailed citation of the evidence supporting the Commission's findings. Such evidence has been referred to in detail by both the Commission and the District Court in their respective decisions. There can be no serious question concerning the adequacy of the evidence, and, because there is not, there is no substantial question presented under this heading.

Conclusion

For the foregoing reasons it is clear that this appeal presents no substantial questions. It is submitted therefore that the order of the District Court dismissing the complaint should be affirmed.

Respectfully submitted,

LEO P. DAY,
EDWARD R. GUSTAFSON,
Room 652—The Union Station,
Chicago 6, Illinois,
Counsel for Appellees, Akron, Canton and Youngstown Railroad Company, et al.

RICHMOND C. COBURN,
Of Counsel.

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